

Internal Revenue Service
memorandum

CC:TL-N-1883-88

Brl:CEButterfield

date: JAN 22 1988

to: District Counsel, Cleveland
Attn: Rick Bloom

CC:CLE

from: Director, Tax Litigation Division

CC:TL

subject: Definition of Real Property Under I.R.C. § 189

This is in response to your request for technical advice dated December 8, 1987.

ISSUE

What public utility property is real property for purposes of the capitalization requirements of section 189. RIRA No. 0189.00-00

CONCLUSION

In response to your request, we have coordinated the issue with the Corporation Tax Division, who had simultaneously opened a ruling project in their division at the request of the Legislation and Regulations Division. Their ruling will incorporate the definition proposed in the unissued regulations under section 189. An early draft of the regulations incorporated the definition of real property contained in Treas. Reg. § 1.1245-3(b). Corporation Tax is proceeding with this ruling request, and we will base our final advice to your on the ruling, when it is available.

LEGAL ANALYSIS

Section 189 requires the capitalization of interest paid with respect to real property during the construction period of that property. The section does not define real property. As your attachment illustrates, there are numerous and varied types of property constructed by utility companies, many of which should fall under the capitalization requirements of the section. Unfortunately there is insufficient guidance available as to how the term real property should be construed. At one


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time the Legislation and Regulations Division had a regulations project under section 189, that would, among other things, have created a definition of real property under the section. This project had been submitted to the Department of the Treasury for approval. Treasury had some objections to portions of the project; before the matter could be resolved the Tax Reform Act of 1986 passed, repealing the section, and the regulations project was terminated.

The Corporation Tax Division has located early drafts of these proposed regulations, and will locate the final draft to use as a basis for their ruling. They believe that the definitional language regarding real property was modified in the final draft from the draft they have located. The draft, however, defined real property as any property not personal property within the meaning of paragraph (b) of section 1.1245-3. Additional support for such a definition is found in the legislative history to section 189, where the Alaska Pipeline is specifically excluded. Had such an exclusion for it not been provided, presumably it would have fallen within the definition, leading to the conclusion that similar types of property were intended to fall within the meaning of the section. H.R. Rep. No. 97-760, 97th Cong., 2d Sess. 485 (1982). This line of reasoning may not be followed in the ruling, however, if the final version of the regulations shows that the Treasury Department manifested a different view. We will keep you informed of the progress of the project, and provide you with a copy of it as soon as we are able.

In the meantime, if you have any questions with regard to this matter, please do not hesitate to call Ms. Clare E. Butterfield, at (FTS) 566-3442.

PATRICK J. DOWLING
Acting Director

By: 
GERALD M. HORAN
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